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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 133

NORTON COMPANY, a corporation,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF RESPONDENT.

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Printed by Authority of the State of Illinois

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Certain of petitioner's sales are consummated as follows:

1. Orders from Illinois customers are received at petitioner's Illinois plant, where they are examined for the purchaser's credit and with respect to availability of merchandise at the Illinois plant. But they are referred to Massachusetts either because the purchaser's credit has not been approved for recognition in Illinois or because the ordered goods are not available at the Illinois plant.

2. These orders are accepted in Massachusetts and are filled from petitioner's stock of goods in that State.

3. The goods are segregated for the purchaser in Massachusetts, title passing in that State, but are shipped in consolidated consignment to petitioner's Illinois office, when they are dispatched to petitioner's customers in the original, or Massachusetts, package. Thus, though title passes in Massachusetts, petitioner ultimately relinquishes possession in Illinois.

May these sales constitutionally measure the Illinois Retailers' Occupation Tax?

II.

Certain of petitioner's sales are consummated as follows:

1. Orders are received at petitioner's Massachusetts plant, are accepted there, are filled from petitioner's Massachusetts stock of goods, segregation occurring in that State.

2. These segregated packages are then consigned to petitioner's Illinois plant, where they are reconsigned to Illinois customers. In this class of sales petitioner ultimately relinquishes possession in Illinois.

Sales in this class differ from sales in Class I only in that the order is first received in Massachusetts, whereas in the Class I sales the orders are received in Illinois but forwarded to Massachusetts for acceptance.

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Certain of petitioner's sales are consummated as follows:

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3. The goods are consigned directly from Massachusetts to the Illinois customer, there being no intermediate consignment to the Illinois plant for reconsignment to the Illinois customer.

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Certain of petitioner's sales are consummated as follows:

1. Orders from Illinois customers are received, accepted and filled at petitioner's Massachusetts plant. The goods are shipped directly from Massachusetts to the Illinois customer.

Does petitioner's engagement in concededly intrastate business in Illinois render this latter class of sales a constitutionally permissible measure of the Illinois Retailers' Occupation Tax?

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I.

Allied Mills v. Department of the Treasury, 318 U. S. 740, is directly in point as to petitioner's sales in Classes I and II.

II.

This court's decisions sustain the constitutionality of the Illinois tax upon all of petitioner's sales involved in this case.

III.

Neither this court's decisions nor constitutional principles inhibit the exaction of any of the taxes imposed on petitioner.

ARGUMENT.

Analysis of the Four Classes of Transactions Involved.

Petitioner regularly makes concededly wholly intrastate sales in Illinois. As to these sales it admits liability for and pays the Illinois Retailers' Occupation Tax. These sales are important only because they admittedly engage petitioner in business in Illinois, the fact of such engagement being important under the teaching of many of this Court's cases relied upon by respondent as sustaining the constitutionality of the tax in question.

In addition to these concededly intrastate and admittedly taxable sales, the petitioner makes sales which may be analytically divided into the following four classes:

CLASS I: The order is **received in Illinois.** It is accepted and filled in Massachusetts. The buyer's goods are segregated in Massachusetts, title passing in Massachusetts. But the goods are **consigned to petitioner's plant in Illinois, possession is relinquished by petitioner in Illinois, and the goods are reconsigned for delivery to the purchaser in Illinois.**

CLASS II: Orders are **received in Illinois**, are accepted and filled in Massachusetts, title passing in Massachusetts, exactly as in Class I, but the goods are **consigned directly to Illinois purchasers.**

CLASS III: **Orders are received** in Massachusetts, are accepted and filled in Massachusetts, but the goods, as in the case of sales in Class I, **are consigned to petitioner's plant in Illinois, possession is relinquished by petitioner in Illinois, and the goods are reconsigned for delivery to the purchaser in Illinois.**

CLASS IV: Orders are **sent from Illinois**, are received, accepted and filled in Massachusetts, the goods being **consigned directly to Illinois purchasers.**

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The Indiana Supreme Court thus tersely stated the relevant facts (220 Ind. 340 at 341, 42 N. E. 2d at 34):

> "The appellee is an Indiana corporation engaged in the manufacture and sale of live stock and poultry feeds, in connection with which it operates a number of factories. In the conduct of its business the appellee divided this State into three geographical areas, each of which was served from a designated factory located at Fort Wayne, Indiana, Peoria, Illinois, or East St. Louis, Illinois. The facilities of these factories were substantially alike and the method of distribution adopted was for the purpose of taking advantage of favorable freight rates, which were reflected in sale prices, and not to evade taxes. The gross income with which we are concerned was derived from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois, pursuant to orders taken in Indiana and accepted in Illinois."

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from points outside the State to the buyer. The validity of the tax or receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U. S. 740) of *Department of Treasury* v. *Allied Mills*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, and *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70."

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If it be suggested that the sales in Allied Mills and the Class E sales in International Harvester, though factually similar to those involved in this case, were taxed under a gross receipts tax, whereas the Illinois exaction is a tax on the privilege of doing business in Illinois, it must be replied that the distinction, if relevant at all, militates *a fortiori* in favor of the Illinois tax: for the Illinois tax requires, as a fulcrum for the exertion of Illinois taxing

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power, the taxpayer's engagement in the specifically defined business operation of retailing, the Indiana tax requiring only the realization of gross income by a taxpayer subject to Indiana law with any permissible Indiana contact with the taxed transaction and receipt.

Illinois submits that this Court's decisions in the *Allied Mills* case and with respect to the "Class E" sales in *International Harvester* case are decisive in favor of the taxability of Petitioner's Class I and Class II sales.

The cogent bearing of the *Allied Mills* and *International Harvester* cases of taxability of Petitioner's Class III and Class IV sales will be discussed under Point 2 immediately *post*.

II.

THIS COURT'S DECISIONS SUSTAIN THE CONSTITUTIONALITY OF THE ILLINOIS TAX UPON ALL OF PETITIONER'S SALES INVOLVED IN THIS CASE.

Illinois' contacts with petitioner's Class I sales are that (1) the order originates in Illinois, (2) it is received in Illinois, (3) the purchased goods, although segregated in Massachusetts, come to petitioner's Illinois plant, for relinquishment of petitioner's possession by reconsignment, and for receipt by an Illinois customer.

Illinois' contacts with petitioner's Class II sales are that (1) the order originates in Illinois, (2) it is received in Illinois, (3) and the goods are shipped from Massachusetts to his Illinois customer.

Illinois' contacts with petitioner's Class III sales are (1) the orders originate in Illinois, (2) they are received in Illinois, (3) and the goods are shipped from Massachusetts to an Illinois customer.

Illinois' contacts with petitioner's Class IV sales are (1) the orders originate in Illinois, where petitioner engages in a concededly intrastate business and in a course of conduct that, we argue *post*, amounts as a matter of law to solicitation of interstate business and (2) ultimate delivery is made to an Illinois customer.

Now petitioner is engaged in intrastate business in Illinois. The "Statement of the Case" in petitioner's brief here utters petitioner's *conclusion of law* that it "has no one soliciting business in Illinois". By this it means only that it does not employ conventional "drummers" or similar canvassers. It does, however, maintain a plant, a stock of goods, and persons who are authorized finally to accept some orders and to receive and forward other orders to petitioner's Massachusetts plant. Petitioner's Illinois office investigates the credit rating of customers whose orders are received in Illinois even though in many cases petitioner's Illinois *personnel* lack authority to approve credit deals.

Illinois says, notwithstanding petitioner's assertions to the contrary, that these activities constitute in a very real sense "the solicitation of business", as well as the doing of business, in Illinois. The maintenance in Illinois of a place of business staffed with *personnel* who may receive all orders and finally accept many orders is, we submit, at least as real a solicitation as is the sending of itinerant canvassers into a State in which the seller has no office and no stock of goods, the "drummers" being authorized to accept no orders whatever.

Bearing in mind these important facts and considerations of the economic relations of petitioner's business, let us turn to this Court's most recently enunciated and most nearly applicable decisions:

BRIEF SUMMARY OF THE RELEVANT PRESENTLY STANDING PRINCIPLES OF CONSTITUTIONAL LAW RELATING TO TAXES MEASURED BY GROSS RECEIPTS FROM INTERSTATE SALES.

It is no longer a precept of Federal constitutional law, if it ever was, that a State tax is invalid merely because it is measured by the gross receipts from sales of goods shipped in interstate commerce. So far as this Court is concerned, such a tax is not *per se* a burden on interstate commerce. This is true whether the taxing State conceives the exaction as a "use tax" levied nominally upon the purchaser but for which the seller is liable to the State, the orders being accepted either within or without the state and the goods being shipped from without the state,[1] or a "sales tax",[2] or a "tax upon the privilege of doing business" although the sales involve transportation in interstate commerce from the taxing State to other States[3] or involve transportation from sister States to customers also without the taxing State.[4]

With these cardinal principles in mind, let us consider the following recent monuments in the field of constitutional law as applied to taxes measured by gross receipts from sales involving interstate commerce either before or after the technical "passage of title".

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[1] *Felt and Tarrant* v. *Gallagher*, 306 U. S. 62. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359. *Nelson* v. *Montgomery Ward & Co.*, *id.* 373. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, in which the vendor did no business in the taxing State except soliciting orders and the goods were shipped from without the State.

[2] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33.

[3] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459.

[4] *American Mfg. Co.* v. *St. Louis*, cited note 3 above, some of the goods involved having been shipped from within, some from without, the taxing State.

NELSON v. SEARS ROEBUCK & CO., 312 U. S. 359, AND NELSON v. MONTGOMERY WARD & CO., 312 U. S. 373.

These two companion cases involved the following facts: Iowa law levies a "sales tax" nominally imposed on intrastate buyers and a complementary "use tax", nominally imposing the latter exaction upon Iowa residents who import goods from out-of-State vendors. But although the two companion taxes were thus nominally imposed upon the purchaser, the vendor was required to "collect" and in fact to pay the tax. There was of course no actual machinery for collecting the tax from Iowa residents because Iowa authorities could have no conceivable means of knowing what goods a resident of Des Moines or Dubuque bought from Sears Roebuck except by surveillance of Sears Roebuck.

Thus, so far as the flow of interstate commerce was concerned, which is all that this Court was concerned with, the economic incidents, consequences and burdens were exactly like those entailed by the Illinois act: An Iowa purchaser ordered goods from Sears, Roebuck or Montgomery-Ward, paid a sum that constituted the purchase price augmented by the tax and received his goods. *The goods were shipped from Illinois. And in many cases, the orders were not only accepted in Illinois but were first received there.* But, as in the instant case, both Sears Roebuck and Montgomery-Ward maintained retail stores in Iowa. *Although the orders were not received or accepted in,* nor were they filled from, these Iowa stores, this Court held the Illinois mail order companies liable for the Iowa tax.

Since this Court stresses practical incidence and consequences of the tax burdens, not the metaphysics of State jurisprudence, as the *criterion* of Federal constitutionality, it is simply unthinkable that this Court would have reached

a different result if Iowa had laid the tax in terms upon the mail order houses rather than upon the purchasers.

But if, notwithstanding the precise economic similarity between the Iowa "use tax" imposed upon the buyer but actually remitted by the seller and the Illinois tax, it is insisted that the theoretical distinction between a tax on the "buyer" and a tax on the "seller" is material, let us consider the case of

AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459.

In this case St. Louis imposed a privilege tax upon the privilege of manufacturing within the city limits, the tax being payable annually and *measured by the gross receipts from the sale of the manufactured goods.*

The taxpayer removed some of its goods, without selling the same, to warehouses outside of Missouri. Later it sold these goods, shipping them from points outside Missouri. It also sold some goods in interstate commerce, shipping directly from Missouri. This Court held that both types of sales—those in which shipment was made from within, and those in which shipment was made from without, the taxing State—might properly measure a privilege tax.

McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

The Illinois Supreme Court has recognized this case as marking a turning point in constitutional doctrine so far as the taxability of interstate commerce is concerned. See the Illinois Supreme Court's opinion in *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136.

In the *Berwind-White* case, a New York sales tax was measured by the gross receipts from the sale of coal. The orders were accepted in New York. But the coal was mined in Pennsylvania. In most cases the coal was deliv-

ered in New York. But the dissenting opinion notes (p. 60) that there "were two purchasers who took delivery outside New York". The tax was sustained.

INTERNATIONAL HARVESTER CO. v. DEPARTMENT OF THE TREASURY, 322 U. S. 340, AND THE COMPANION CASE GENERAL TRADING CO. v. TAX COMMISSION.

Closely in point is this Court's decision *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340, already discussed (Point I, *ante*) in its application to petitioner's Class I sales.

In that case this Court had occasion to determine the validity of Indiana's gross receipts tax to transactions, *inter alia,* which it thus described:

> "Sales by branches to dealers and users, residing in Indiana, in which the goods were shipped from outside Indiana to customers in Indiana, by contracts so providing."

If petitioner seeks to distinguish this case on the ground that the sale was made "by branches in Indiana", the reply is that the companion case of *General Trading Co.* v. *Tax Commission, id.* 335, the General Trading Co. "never qualified in Iowa and has no office, branch or warehouse there" (*dissent,* page 339) and "orders are accepted only in Minnesota". Nevertheless this Court sustained the tax. True, the Iowa tax was nominally imposed on the purchaser and the non-resident taxpayer was nominally a "collector". The fact remains, though, that one who merely solicited orders in Iowa was subject to that State's taxing power, the tax being measured by gross receipts, even though the goods were shipped and title passed from without the State.

These two cases, which were decided together and must be read together, sustain State taxes even though (1) the taxpayer receives orders without the taxing State, accepts them without the State and fills them without the State if it does *any business at all, even though the business involved be only soliciting* within the State where the goods are delivered.

III.

NEITHER THIS COURT'S DECISIONS NOR CONSTITUTIONAL PRINCIPLES INHIBIT THE EXACTION OF ANY OF THE TAXES IMPOSED ON PETITIONER.

Petitioner, it must be remembered, is a Massachusetts corporation engaged in doing a concededly intrastate business in Illinois. Without Illinois' suffrance petitioner could not do this business. That business consists not only in the solicitation and receipt of orders but in accepting and filling many of these orders wholly within Illinois.[1]

Illinois permits petitioner to maintain a plant, as well as managerial, sales and technical *personnel,* in Illinois, for the purpose of transacting concededly intrastate, as well as clearly interstate, commerce.

Petitioner may very largely determine whether an order received in Illinois from an Illinois customer will be filled from petitioner's Illinois stock of goods, in which case of course the transaction is taxable, or is to be forwarded to Massachusetts for acceptance and segregation of goods, in which case, says petitioner, the transaction is immune to the Illinois tax.

Petitioner's chief reliance is upon *McLeod* v. *Dilworth Co.*, 322 U. S. 327. In that case this Court refused to sanc-

---

[1] We have demonstrated II, *ante*, that petitioner's activities *do* constitute "solicitation", notwithstanding petitioner's protests to the contrary.

tion a sales tax laid by Arkansas upon a Tennessee vendor that had no place of business, maintained no stock of goods, and engaged in no intrastate business in the taxing State. This Court deemed it relevant to say at page 328:

> "Respondents are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State."

These factors, salient and we think decisive in the *Dilworth* case, are absent in the instant case. The instant petitioner *is* "qualified to do business" in Illinois, *does* have a "sales office," a "branch plant" and a "place of business in Illinois" and *does* process much of its interstate business in Illinois.

It is interesting to note that petitioner does not explicitly recognize any difference between the four categories of sales that we have analytically distinguished in beginning this Argument.

Classes I and II have been held taxable by this Court in the *Allied Mills* case; cited and applied, Point I, *ante*. If, as the tenor of petitioner's argument assumes, all of petitioners' sales must be treated alike, then all of them must be held taxable; for sales exactly like those involved in Points I and II have been held taxable in *Allied Mills*.

Though we recognize differences among the four classes of sales analyzed *ante*, we submit all of them are taxable because petitioner is taxed for a privilege, viz., that of doing concededly local business in Illinois and thereby fostering, by intrastate activities, an Illinois market for goods which it may ship at its election from within or without the State. This, we think, is a sufficient *nexus* between sovereign and foreign corporation doing business within the sovereign's territory to sustain a tax measured by the

gross receipts from all orders which result in ultimate delivery to petitioner's Illinois customers.

We submit that the tax in question is well within the ambit of Illinois' taxing power so far as any Federal question is concerned.

Conclusion.

For reasons apparent on the record, stated in the Illinois Supreme Court's opinion and urged in this brief, the Illinois Supreme Court's judgment should be affirmed.

Respectfully submitted,

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